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In the Supreme Court of the United States.

OCTOBER TERM, 1982.

FREDERICK C. LANGONE, ET AL.,
APPELLANTS,

v.

MICHAEL J. CONNOLLY, AS HE IS SECRETARY OF STATE OF THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Supplemental Brief in Support of Motion to Dismiss.

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INTRODUCTION

The Jurisdictional Statement filed in connection with this case (No. 82-936) by Frederick C. Langone ("Langone"), Madeline G. Sarno, Victor Grillo, Louis Ferretti, Gail A. Fasano, and The Langone For Lieutenant Governor Committee (collectively referred to as "Langone supporters") was received on December 6, 1982. On January 5, 1983 Michael J. Connolly, as he is Secretary of State of the Commonwealth of Massachusetts ("State Secretary"), filed a Motion to Dismiss in this case and a related case (No. 82-927). The State Secretary received Appellants' Brief Opposing Motion to Dismiss of Appellee, Connolly ("App. Br.") on February 11, 1983. This Supplemental Brief in Support of Motion to Dismiss is filed calling attention to matters raised

in appellants' Brief which were not available at the time the State Secretary filed his Motion to Dismiss. Sup. Ct. R. 16.6.

STATEMENT OF FACTS

Langone and Langone supporters state that "[t]here are a number of important factual inaccuracies contained in the Motion to Dismiss of Appellee Connolly which are of significance to the issues before this Court." (App. Br. at 1) Three "inaccuracies" are enumerated. (App. Br. at 1-5) They will be discussed seriatim.

First, Langone and Langone supporters state that Langone did not seek the "nomination of the Massachusetts Democratic Party 'by means of pasters or write-ins.'" (App. Br. at 1-2) This statement is erroneous. The Statement of

Agreed Facts discloses that Langone announced his candicacy on March 29, 1982 and that he filed nomination papers with the State Secretary on May 26, 1982. Langone did not withdraw his candicacy. After June 4, 1982 it was too late for Langone to withdraw. Mass. Gen. Laws ch. 53, §§13 and 25. (Motion to Dismiss at 6 n. 6 & App. 27) It is also noteworthy that Langone accepted limited public financing as a candidate after he was notified that his name would not appear upon the Democratic state primary ballots. (Motion to Dismiss at 41 n.25 & App. 46) If Langone did not wish to seek the nomination of the Massachusetts Democratic Party "by means of pasters or write-ins" (Mass. Gen. Laws ch. 53, §§3, 35B and 40) (Motion to Dismiss at 40-41 & App. 23, 27, 33) he was required by

statute to file a formal request to withdraw with the State Secretary.

Langone and Langone supporters also quote (App. Br. at 2) the statement in the State Secretary's Motion to Dismiss that: "If [Langone] had received write-in votes in an amount sufficient to give him a plurality of the votes cast in the primary, he would have been the Party's nominee. Mass. Gen. Laws ch. 53, §§2, 40. (App. 22, 33)." (Motion to Dismiss at 40) By including this statement in their list of "inaccuracies" Langone and Langone supporters intimate that the statement is incorrect. Significantly, they do not, and cannot, challenge its accuracy.

Second, Langone's pre-convention statement, which was annexed to and incorporated by reference in the State-

ment of Agreed Facts, does begin with a sentence that describes the Endorsing Convention as "non-binding." (App. Br. at 3-4) The very next sentence, however, clarifies Langone's beliefs concerning the Convention. Langone complains that the "Primary should be open to anyone who obtains the necessary number of certified signatures for a statewide constitutional office." He then decries any attempt "[t]o limit candidates for any office." Any fair reading of Langone's entire pre-convention statement in context discloses that he was fully aware of the impact of the "fifteen percent rule."

The third and final "inaccuracy" listed by Langone and Langone supporters (App. Br. at 4-5) blurs the distinction between an announced candidate and a qualified candidate. Any person can

announce his or her candidacy for office. However, unless and until that person satisfies pertinent statutory requirements for candidacy, he or she is not a qualified candidate. Langone announced his candidacy on March 29, 1982. As an announced candidate, "Langone was sent a copy of an announcement released by the State Secretary on April 9, 1982 which informed Langone that the Governor had requested the advisory opinions of the Justices. All [announced] candidates were invited to file briefs with respect to the question of the 'fifteen percent rule.' Langone did not accept this invitation." (Motion to Dismiss at 61-62) (emphasis original) Until Langone submitted nomination papers on May 26, 1982, the State Secretary did not know and could not have known that Langone was

a qualified candidate.

In sum, the assertions of Langone and Langone supporters are "inaccuracies." The statements in the Motion to Dismiss are correct.

JURISDICTION OF THIS COURT

Langone and Langone supporters assert that in this case "there were two distinct challenges to the constitutionality of the Massachusetts statutory scheme for obtaining access to the state primary election [sic] ballot. M.G.L. c. 53, §§1 et. seq." (App. Br. at 5-6) To the contrary, as demonstrated in the Motion to Dismiss, "no party in this case has ever challenged the constitutionality of any statute" (Motion to Dismiss at 2-6) (emphasis original), much less the Massachusetts "statutory scheme" for primary ballot access.

The statutory filing requirements for primary ballot access are: nomination papers signed by at least 10,000 registered voters; written acceptance of nomination; certification of party enrollment; and financial interest statement. (Motion to Dismiss at 27 n.16) None of these statutory requirements has been challenged. Langone and Langone supporters challenge only the validity and enforcement of the "fifteen percent rule." (Motion to Dismiss at 4 n.4 & App. 3-4) Therefore, the statutorily-prescribed requirements for primary ballot access are "not sufficiently drawn in question" to sustain appellate jurisdiction. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 562-63 n.4 (1980).

The first asserted "challenge" to the "statutory scheme" is based on a misreading of the Opinion of the Justices, 385 Mass. 1201, 434 N.E.2d 960 (1982), and a misstatement of the issues presented in this case. In the Opinion of the Justices, the Justices of the Massachusetts Supreme Judicial Court unanimously opined that Massachusetts House Bill No. 5852, a proposed amendment to Mass. Gen. Laws. ch. 53, §44, "would abridge the constitutional rights of the Democratic party and its members to associate." Id. at 1207-08, 434 N.E.2d at 964. After the Opinion of the Justices was issued, House Bill No. 5852 was recalled from the Governor to the Senate and no further action was taken on the bill. Thus, the proposed amendment addressed in the Opinion of the Justices

is not at issue here.

Langone and Langone supporters mistakenly assert that:

> Among the questions presented to the Supreme Judicial Court ... were whether enforcement of the provisions of M.G.L. c.53, §§1 et seq., required that Langone's name be placed on the state primary election [sic] ballot notwithstanding his failure to meet the state Democratic Party's "fifteen percent requirement" and whether enforcement of the provisions of M.G.L. c.53, §§1 et seq., would infringe or abridge the constitutional rights of the Democratic Party and its members. (App. Br. at 7-8)

Neither question was presented to the Massachusetts Supreme Judicial Court. The two questions presented to that court are delineated in the Reservation and Report. (Motion to Dismiss at 10 & App. 8). They inquire whether the name of a candidate, such as Langone,

who has "complied with applicable statutory requirements must appear upon the Democratic state primary ballots, notwithstanding the failure" to comply with the "fifteen percent rule" and whether the State Secretary's decision not to place the name of such candidates upon the Democratic state primary ballots violated the constitutional rights of those candidates. Compliance with the "statutory scheme" was assumed. No statute was challenged.

The questions presented to the Massachusetts Supreme Judicial Court involved a contest between the constitutionally-recognized rights of the Massachusetts Democratic Party and alleged constitutional rights of Langone and Langone supporters. The interpretation and application of the "statutory

scheme" for primary ballot access was not involved.

The second asserted "challenge" to the "statutory scheme" is:

> [W]hether M.G.L.c.53, §§1 et seq., is facially invalid as it fails to provide fair notice of appellee Connolly's and the appellee Democratic State Committee's authority to impose ballot access requirements contained in political party rules or whether the statute was invalidly applied to the appellants. (App. Br. at 10)

Suffice it to say, this "challenge" has been fabricated. The gist of this "challenge" is that Langone and Langone supporters did not receive "fair notice" of the effect of the "fifteen percent rule." The "statutory scheme" is not involved. Once again, the statutory requirements are "too tangentially involved to satisfy" statutory appellate jurisdiction. Garrity v. New Jersey,

385 U.S. 493, 496 (1967).

In sum, this case involves only a final judgment rendered by the highest court of Massachusetts where rights are claimed under the United States Constitution. 28 U.S.C. §1257(3). Accordingly, this Court should regard the Jurisdictional Statement of Langone and Langone supporters as if they seek review by writ of certiorari. 28 U.S.C. §2103.

ARGUMENT

LANGONE'S CLAIM THAT HE DID NOT RECEIVE FAIR NOTICE OF THE EFFECT OF THE FIFTEEN PERCENT RULE IS NOT CAPABLE OF REPETITION.

Langone's "fair notice" claim is moot. (Motion to Dismiss at 60 n.34). The 1982 Massachusetts Democratic state primary and the 1982 Massachusetts general election are history. It is now impossible to grant Langone's request

that his name be placed upon the 1982 Democratic state primary ballots. See Hall v. Beals, 396 U.S. 45, 48 (1969).

Langone and Langone supporters assert that, because they sought declaratory relief as well as injunctive relief below, this Court's decisions in Hall v. Beals, supra, and Brockington v. Rhodes, 396 U.S. 41 (1969), are inapposite. (App. Br. at 11-16) However, they conveniently ignore the requirement that the issues involved must be "capable of repetition, yet evading review" to avoid being rendered moot. Moore v. Ogilvie, 394 U.S. 814, 816 (1969). (emphasis supplied). Langone's "fair notice" claim is demonstrably not "capable of repetition."

Langone and Langone supporters contend that since the "Democratic State

Committee is apparently free to enforce whatever charter provisions respecting ballot access that the state Democratic Party may enact ... the circumstances of the 1980 [sic] primary election [sic] are capable of repetition as prospective statewide candidates will be unable to divine from the statutes who has authority to impose ballot access requirements and what those requirements will be." (App. Br. at 15) The premise of this contention is misleading. This case involves a single Massachusetts Democratic Party Charter provision, the "fifteen percent rule." The Massachusetts Supreme Judicial Court did not consider or adjudicate the validity or enforceability of any other actual or hypothetical Charter provision.

Prospective Massachusetts Democratic statewide candidates, including Langone, are certainly now on notice that compliance with the "fifteen percent rule" is a necessary precondition to Democratic state primary ballot access. Consequently, Langone's "fair notice" claim, as distinguished from his substantive challenge to the "fifteen percent rule", is not "capable of repetition" and is moot.

CONCLUSION

For all of the foregoing reasons, appellee Michael J. Connolly, as he is Secretary of State of the Commonwealth of Massachusetts, moves this Court to dismiss the appeal of Langone and Langone supporters or, in the alternative, to deny the request of Langone and Langone

supporters for review by writ of certiorari.

Respectfully submitted,

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